IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LOLA HOGAN, by and through her next friend, PEGGY DAVIS, Petitioner, v. HON. ROBERT DUBER, Judge of the Superior Court of the State of Arizona, in and for the County of Gila, Respondent, and LIFE CARE CENTERS OF AMERICA, INC., a Tennessee corporation, dba HERITAGE HEALTH CARE CENTER, and GREG LECHEMINANT, Administrator, Real Parties in Interest.	2 CA-SA 2007-0037 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Gila County Cause No. CV2005-034

JURISDICTION ACCEPTED; RELIEF GRANTED

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E S P I N O S A, Judge.

¶1 Petitioner Peggy Davis filed this damages action on behalf of her elderly mother Lola Hogan, and now seeks special action relief from the respondent judge's ruling it will instruct the jury at trial that, to recover damages for Hogan's claim under the Adult Protective Services Act (APSA), A.R.S. §§ 46-451 through 46-459, Davis must show that real party in interest Life Care Centers of America, Inc. was grossly negligent and acted with the culpable mental state of criminal negligence. For the reasons that follow, we accept jurisdiction of the special action and vacate the respondent judge's ruling.

Factual and Procedural Background

¶2 The following facts are undisputed. Hogan suffered a stroke in November 2003 and was admitted on December 3 to Heritage Health Care Center, a nursing home owned by Life Care Centers of America. On the evening of December 21, an

intoxicated stranger, Angel Rosales, entered the nursing home and sexually assaulted Hogan. Rosales was soon apprehended by the police and was later convicted of vulnerable adult abuse and sentenced to five years in prison. Davis sued Life Care Centers for negligence, negligence per se, and vulnerable adult abuse, claiming the nursing home and its staff failed to protect Hogan from intruders like Rosales.

¶3 The respondent judge granted Life Care's motion for summary judgment on Davis's request for punitive damages and her claims against the administrator of Heritage Health Care Center. However, during a discussion on Life Care's arguments that its conduct was not a proximate cause of Hogan's damages, the respondent judge concluded Davis cannot recover under APSA unless she shows Life Care's employees acted with criminal or gross negligence and stated it would so instruct the jury at trial. Davis moved for reconsideration of that conclusion, arguing APSA does not impose that requirement in a civil action. After a hearing, the respondent judge denied the motion, elaborating at length on his previous conclusion, and subsequently refused to stay the trial scheduled to begin two weeks later. This petition for special action followed, and we have stayed the trial pending resolution of the issue.

Special Action Jurisdiction

¶4 Although the respondent judge made his ruling during a hearing on a summary judgment motion, it was not, as Life Care concedes, a ruling on the motion itself. Davis has expressly noted she is not challenging the respondent judge's granting of partial summary

judgment on her claims for negligence per se and punitive damages and on her claims against Heritage Health's administrator. Nor is the ruling a denial of summary judgment, a type of ruling we rarely address in a special action proceeding. *See City of Phoenix v. Yarnell*, 184 Ariz. 310, 315, 909 P.2d 377, 382 (1995); *Callan v. Bernini*, 213 Ariz. 257, ¶ 2, 141 P.3d 737, 738 (App. 2006). Instead, we conclude the ruling determined the instructions the respondent will give the jury on the APSA claim at trial, an issue not raised in Life Care's summary judgment motion. The only issue Life Care raised on the APSA claim in its motion pertained to proximate cause.

¶5 We disagree with Life Care's assertion that the respondent judge did not make a determination but simply stated a "present intention to perform a future act subject to further proceedings." We also disagree the special action petition is premature and subject to becoming moot. When the respondent first ruled, trial was scheduled to begin in nineteen days. By the time of his second ruling, in which he emphatically reaffirmed the first, trial was a mere two weeks away. Because the time for discovery had ended, all facts had been disclosed, and trial was imminent, we find no merit to Life Care's contention that Davis is asking us to "advise" the respondent "on what *may* become a determination of jury instructions in the future." The essential facts of the case were presented to the respondent in connection with Life Care's motion for summary judgment, and he expressly interpreted APSA and declared how he will instruct the jury at trial.

¶6 Our reasons for accepting special action jurisdiction are several. First, we conclude the respondent abused his discretion by misinterpreting a statute, a pure question of law. *See Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 10, 63 P.3d 282, 285 (2003); *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). Second, although Davis has a remedy by appeal, *see* Rule 1(a), Ariz. R. P. Spec. Actions, 17B A.R.S., that remedy is neither equally speedy nor adequate considering Hogan's age and infirmities. *See In re Guardianship/Convservatorship of Denton*, 190 Ariz. 152, 154, 945 P.2d 1283, 1285 (1997) (citing as one reason for granting review of special action petition "[t]he advancing age of petitioner and others similarly situated"). Moreover, given our conclusion that the respondent's interpretation of APSA is erroneous, the interests of judicial economy favor our accepting jurisdiction rather than requiring Davis "to proceed to an inevitable reversal on appeal." *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App. 1996). Accordingly, we accept jurisdiction of the special action.

Adult Protective Services Act

¶7 The Adult Protective Services Act, A.R.S. §§ 46-451 through 46-459, both defines a criminal offense and creates a civil remedy. The pertinent provisions of § 46-455 read as follows:

> A. A person who has been employed to provide care, who is a de facto guardian or de facto conservator or who has been appointed by a court to provide care to an incapacitated or vulnerable adult and who causes or permits the life of the adult

> to be endangered or that person's health to be injured or endangered by neglect is guilty of a class 5 felony.
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> B. An incapacitated or vulnerable adult whose life or health is being or has been endangered or injured by neglect, abuse or exploitation may file an action in superior court against any person or enterprise that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care to such incapacitated or vulnerable adult for having caused or permitted such conduct. . . .

¶8 We review de novo the respondent judge's interpretation of the statute. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, ¶ 8, 105 P.3d 1163, 1166 (2005). Interpreting a statute requires us to determine and apply the intent of the legislature. *Mail Boxes, Etc., U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). "We focus first on the statutory wording and, if it is ambiguous or inconclusive, we consider the statute's 'context, subject matter, historical background, effects, consequences, spirit, and purpose.'" *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 17, 965 P.2d 47, 53 (App. 1998), *quoting Mail Boxes, Etc.*, 181 Ariz. at 122, 888 P.2d at 780.

¶9 Although our supreme court has noted there is "some degree of ambiguity" in the Act, its observation referred to language in the definitions section, not in the subsections at issue here. *Estate of McGill v. Albrecht*, 203 Ariz. 525, ¶ 7, 57 P.3d 384, 387 (2002). The respondent judge focused primarily on the similar language in the two subsections of § 46-455—"causes or permits" in the criminal provision, subsection (A), and "caused or permitted" in the civil remedy provision, subsection (B). After consulting a dictionary, a

thesaurus, a statute in title 13 of Arizona Revised Statutes defining a criminal offense, a decision by this court, and cases from other jurisdictions, the judge concluded the similarity in language requires a plaintiff in a civil action to prove that the defendant acted with "at least criminal negligence." We cannot agree.

¶10 It is clear from the plain language of both subsections that they apply to different actors and to different actions. Only "[a] person who has been employed to provide care, who is a de facto guardian or de facto conservator or who has been appointed by a court to provide care to an incapacitated or vulnerable adult" can be charged with a criminal offense. § 46-455(A). A civil action, on the other hand, can be brought against "any person *or enterprise* that has been employed to provide care, that has assumed a legal duty to provide care or that has been appointed by a court to provide care" to an incapacitated or vulnerable adult. § 46-455(B) (emphasis added). "Enterprise" as defined in the Act includes "any corporation, partnership, association, labor union, or other legal entity, or any group of persons associated in fact although not a legal entity, which is involved with providing care to an incapacitated or vulnerable adult." § 46-455(Q).

¶11 In addition, only caregivers or de facto guardians or conservators who "neglect" incapacitated or vulnerable adults are subject to criminal prosecution under § 46-455(A), whereas a civil remedy is available under § 46-455(B) to incapacitated or vulnerable adults whose life or health has been endangered or injured by "neglect, abuse or exploitation." Each of those words is defined in the Act. "'Neglect' means a pattern of

conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health." § 46-451(A)(7). "'Abuse' means: (a) Intentional infliction of physical harm. (b) Injury caused by negligent acts or omissions. (c) Unreasonable confinement. (d) Sexual abuse or sexual assault." § 46-451(A)(1). And "'[e]xploitation' means the illegal or improper use of an incapacitated or vulnerable adult or his resources for another's profit or advantage." § 46-451(A)(4).

¶12 As the supreme court noted in *McGill*, the definitions are somewhat ambiguous because the "abuse" definition "includes injury caused by negligent acts or omissions." 203 Ariz. 525, ¶ 7, 57 P.3d at 387. That ambiguity, however, does not affect the issue before us—the difference between the conduct that subjects an actor to liability in a civil action and that constituting a criminal offense.[1] The supreme court in *McGill* touched on the issue in determining whether the civil remedies created in APSA and those created in the Medical Malpractice Act, A.R.S. §§ 12-561 through 12-571, are mutually exclusive. 203 Ariz. 525, ¶ 18, 57 P.3d at 389. In holding they were not, the court observed that the language in APSA did not permit it "to conclude that something more than negligence is required to constitute abuse." *Id.* ¶ 20. And, noting "the legislature explicitly

[1]Contrary to the respondent's determination, mens rea is not an issue in the underlying civil action. That concept applies only in criminal cases. *See Black's Law Dictionary* 1006 (8th ed. 2004) (defining "mens rea" as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime").

stated that both intentionally caused harm and negligently caused harm could constitute abuse," the court rejected the defendants' argument that "the legislature meant to require a showing of gross negligence to sustain a plaintiff's burden of proving abuse." *Id.*

¶13 It is also clear from the definition of criminal negligence that it applies only to criminal prosecutions. Section 13-105, A.R.S., states that its definitions apply to title 13. And § 13-105(9)(d), which defines "criminal negligence," expressly applies "to a result or to a circumstance described by a statute defining an offense." By its very language, therefore, that state-of-mind requirement can only apply to an offense committed in violation of § 46-455(A),[2] not to a civil action brought under § 46-455(B).[3]

¶14 Finally, even assuming any statutory ambiguity on the issue presented here, the legislative history of APSA supports our interpretation of its language. The original act provided neither criminal nor civil remedies, applied only to incapacitated adults, and authorized Adult Protective Services workers to seek court-issued special visitation warrants

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[2]For the same reason, we find misplaced the respondent's reliance on the legislature's use of the term "permitted" in A.R.S. § 46-455(B) and "permits" in A.R.S. § 13-3005, which prohibits intercepting wire, electronic, and oral communications, especially in light of § 13-3005's requirement that a person have acted intentionally, an allegation Davis has not made against Life Care Center.

[3]We also note that none of the out-of-state cases on which the respondent relied is applicable. One was a criminal prosecution for child abuse, *People v. Sargent*, 970 P.2d 409 (Cal. 1999); another a criminal prosecution for elder abuse, *Vallery v. State*, 46 P.3d 66 (Nev. 2002); and the third a civil action for willful misconduct and intentional infliction of emotional distress, *Guardian N. Bay, Inc. v. Superior Court*, 114 Cal. Rptr. 2d 748 (Ct. App. 2001).

to determine whether such adults were being abused, exploited, or neglected. 1980 Ariz. Sess. Laws, ch. 127. When § 46-455 was added to the Act, it provided only a criminal remedy, making a violation a class one misdemeanor. 1988 Ariz. Sess. Laws, ch. 85, § 2. It was not until the following year that the legislature created civil remedies. 1989 Ariz. Sess. Laws, ch. 118, § 3. It amended § 46-455(A) again in 1991, making a violation a class five felony instead of a class one misdemeanor and applying the Act to vulnerable as well as incapacitated adults. 1991 Ariz. Sess. Laws, ch. 219, § 6. We find nothing in the successive amendments to support a conclusion the legislature intended the state of mind required to establish a criminal violation to apply to a civil action brought under the Act.

¶15 Given the legislature's stated intent in adopting the Act, the Act's plain language, the legislature's separate creation of criminal and civil remedies, and the Act's legislative history, we conclude Davis must show only ordinary negligence to establish her APSA claim against Life Care Centers. Accordingly, we grant special action relief and vacate the respondent judge's ruling.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge